CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1826.

East'n. District.
May, 1826.

LANUSSE'S SYNDICS *vs.* PIMPIENELLA.

LANUSSE'S SYNDICS vs. *PIMPIENELLA.*

APPEAL from the court of the first district.

The plaintiff against whom a plea of reconvention is filed, cannot discontinue.

If an agent, who is to be paid on condition that he succeeds in the business entrusted to him, be dismissed without cause, he can claim a sum equal to the trouble he has been put to.

PORTER, J., delivered the opinion of the court. This action was commenced to recover from the defendant, a sum of money, charged in the petition to have been received by him in the capacity of attorney in fact to the plaintiffs.

The answer admits the agency; the receipt of a sum of money amounting to 9957 dollars 62½ cents; but avers, that the defendant's expenses in collecting the money in Mexico, and pursuing other claims of the the plaintiffs there, amounted to 3999 dollars 93 cents, and

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that he has paid over to Paul Lanusse, the attorney of the syndics, 5953 dollars 68¾ cents; which leaves a balance in favor of the plaintiffs only of four dollars.

The answer also avers, that the defendant was charged by the plaintiffs with the recovery of the proceeds of a cargo of a vessel confiscated by the former government of Mexico, amounting to 49,600 dollars in specie, and a quantity of tobacco; that the plaintiffs agreed to pay his expenses in prosecuting this recovery, and to allow him ten per cent. commission on the amount which might be received by him.

That with infinite labor, trouble and expense, he, the defendant, had nearly completed the recovery of the claim entrusted to his management, when the plaintiffs annulled the power conferred on him, and appointed another agent in his stead.

That, by reason thereof, he was prevented from complying with his agreement, and that he is entitled to the same commission, as if the money had been collected. For the amount of this commission, deducting the balance of four dollars, due him on the monies collected, judgment is prayed in reconvention

On this answer being put in, the plaintiffs moved the court for leave to discontinue. It was granted to them; but on a rule taken by the appellee, this order was rescinded, and the cause reinstated.

The correctness of the decision which denied the plaintiff the permission to withdraw his case, is the first question presented for our examination.

Unless the situation of the parties in this case, greatly differs from ordinary ones, it was conceded on the part of the appellee, that the application should have been sustained.

The right of the defendant to reconvene the plaintiffs in the same suit, in which the latter makes a demand of him, though as clearly established by the ancient laws of this country, as any other principle to be found in them, and though of familiar use among all the modern nations whose jurisprudence is derived from the same origin as ours, has but recently been put into practice in this state. The first case in which it was expressly recognized by this court, was that of *Evans* vs. *Gray*. The legislature have since acted on it; but they have done no more than establish the general principles, leaving the par-

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ticular questions which might arise to be decided by deductions from those general principles; or by reference to the Spanish jurisprudence where not only the same general rules are found, but the modifications, which they have received in their application to particular cases. 12 *Martin*, 483; *Vol.* 2, 73; *Dig. liv.* 2, *tit.* 1, *c.* 11; *Toullier, Droit Civil Français, vol.* 7, *liv.* 3, *tit.* 3, *cap.* 5, *no.* 346, *in note; Febrero, p.* 2, *lib.* 3, *cap.* 1, §6, *no.* 224; *Curia Phil. p.* 1; *Juicio Civil*, §15, *nos.* 7 *and* 9; *Code of Practice*, 374—77.

Whether the plaintiff can discontinue his action, and by this means, put both himself and the defendant out of court, will depend in some measure on ascertaining in what light he is to be viewed in relation to the demand in reconvention; whether he be not *quoad* this demand really defendant: for, if he is, it would seem to follow as a consequence, that he cannot exercise a right which is given to those who are asking for judgment against others, and who are therefore left at liberty to enforce their claims in the manner, and at the time which their interests may dictate. He stands, on the contrary, according to the hypothesis just put, in a situation where every

imaginable reason is opposed to the exercise of such a privilege. There would be few judgments we imagine, rendered in this country, or any other, if the party against whom condemnation was prayed, and against whom it was about to be pronounced, could arrest the sentence, by the expression of a wish that it should be postponed to another time, or by desiring, that the suit against him should be discontinued.

Now, with the exception, that the defendant who sets up the plea of reconvention is not the party with whom the cause originates, it is not seen by us in relation to such claim, in what other light he can be viewed than as plaintiff. In all these things, which essentially distinguish the one from the other, he certainly is: his demand is not merely that the plaintiff shall not have judgment, but that he shall be obliged to render to the defendant something which is withheld from him. On the judgment which might be rendered on this demand, the same consequences would follow as if the suit had been commenced by original petition, instead of one in reconvention.

Reconventio est petitio quâ reus vicissim, quid ab

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actore petit, ex eadem, vel diversa causa. Voet. in tit. de Judiciis, no. 78.

La reconvencion es segunda convencion, mutua peticion, ó nueva demanda, que el reo pone al actor en vista de la que este le puso. Febrero, p. 3, *cap.* 1, §6, *no.* 224.

It follows then, that every consideration which prohibits the defendant from withdrawing from a cause, applies with equal force against allowing the plaintiff to discontinue the demand presented against *him;* and, if the reasoning from general principles, on which this conclusion has been obtained, required any aid from the practice in the Spanish courts, the books which treat of it, are clear and express, that in those tribunals he had no power to do so. *Febrero, p.* 2, *lib.* 3, *cap.* 1, §6, *nos.* 224, 237.

It was contended, that the right to discontinue at any time before verdict rendered, was an incident belonging to the trial by jury, and that the introduction of that mode of trial into Louisiana, brought with it this right. In the present case, no jury was prayed for; the argument, therefore, does not apply: but if it had, would the plaintiff's position be made stronger? We think not. The rights of the

parties, and their control over the cause, must depend on our laws, not those of England. In that country, the plaintiff cannot be made defendant; here, as we have already seen, he may: to make the practice there, a guide for us, it should be shown, that at common law the *defendant* has the power to discontinue at any time before verdict. The introduction of a new mode of trial does not repeal the former provisions of our law, in relation to those matters which might be put at issue and tried in the same cause, unless that mode of trial was incompatible with the investigation of these matters. No such incompatibility has been shown here: the jury can as well try, and decide, two issues as one.

As to the decision of this court, in which it was stated, that this plea might be used as a *defence* against the plaintiffs' claim, no aid can be derived from it, to support the plaintiffs on the ground assumed by them. Pleas in reconvention are of three kinds. The *first* is, where the defendant sets up a liquidated claim which is of greater amount than that on which he is sued, and asks judgment for the surplus. Pleadings containing such matter, embrace two things: compensation which ex-

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tinguishes the plaintiff's demand, and reconvention for the balance due. The *second* is, where the sum set up in the answer is not liquidated, and the object of the plea is, that it should be made so, in order that the sum found due should be used in compensation of the plaintiffs' claim, and that judgment should be obtained for the overplus. The *third* and last kind is, where the demand is totally independent of the action brought by the plaintiff; but it has been lately excluded from our practice by legislative provision. The first and second are most usually decided at the same time that judgment is given on the original demand; but, though they are both used for the purposes just mentioned, there cannot be a doubt, that for the sum for which judgment is demanded in the plea, the defendant is really and substantially plaintiff. The terms used in the laws on this subject, and by the writers who comment on them, by which the party who sets up this plea is called the *defendant*, and he against whom it is used, is styled *plaintiff*, cannot change the nature of things. These terms are resorted to from necessity, to avoid confusion in explaining, by whom, and against whom, this right can be

exercised. *Code of Practice*, 376; *Toullier, Droit Civil Français, liv.* 3, *tit.* 3, *cap.* 5, *nos.* 349, 350, 351.

The amount accorded by the court below to the defendant, for the expenses by him incurred, was not much contested in argument, but that part of the judgment which allowed him a certain sum as the value of his services in the business which was not completed, at the time the power was revoked, has been urged to be erroneous. That the claim, which the court has thus sustained by its judgment, is one of the strongest equity, cannot be denied. It is difficult to imagine a case of greater injustice, than that of an agent employed on the promise of remuneration, if he succeeded in the matter for which he is engaged, being dismissed without any imputed fault; and the dismissal followed up by a refusal to pay him any thing for the care taken, the time lost, and the trouble experienced, in the service of those who wantonly discharge him. The law does not sanction such a proceeding. If, as formerly, the contract of mandate was gratuitous, and the agent had undertook to perform it without reward, the principal might put an end to it when he

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out of a vessel to lighten her and put on the beach, in case of damage, furnish cause for a claim of general average.

The action cannot be defeated on the ground that there are other owners, unless the plea discloses who they are.

certain boxes containing books belonging to him, which were received on board, to be carried from Pensacola to New-Orleans as ordinary freight; and which were damaged by being thus removed, to the amount of six hundred and twenty-nine dollars, [illegible] three cents, &c. Judgment was given in favor of the plaintiff in the court below, from which the defendant appealed.

The facts of the case as they appear on the record, according to the evidence admitted in the district court, show, that the plaintiff was on board a sloop called the Herald, coming in October, 1821, then owned and commanded by the defendant, several boxes of books to be carried from Pensacola to New-Orleans in the vessel he came passenger at the same time; that the sloop soon after leaving port got aground, which made it necessary to lighten her, and this was effected in part, by placing the merchandise of the plaintiff on the beach as above stated, where they received the injury complained of by a sudden rise of the bay.

Some of these facts are in part established by evidence to which the defendant excepted

the court below; and it is necessary before investigating the cause on its merits to examine the bills of exceptions taken to the admissibility of certain depositions or testimony taken down in writing between the parties in the present suit, in one which was formerly instituted and finally decided, where the plaintiff claimed recompense against the defendant to the amount of his entire loss, on the ground of alleged negligence and misconduct in the latter, as master of said sloop, &c. The exceptions are to the testimony of two witnesses, Merry and Davidson; one shown to be without the jurisdictional limits of the state, and the other to be dead. In support of his objections to the evidence, the counsel for the appellant relies principally, on the doctrine which relates to the propriety of allowing records of previous suits to be introduced, as proofs in subsequent actions between the same parties; and in aid of the principles for which he contends, refers the court to 2d of *Johnson's Reports, p.* 24; and 1st of *Esp. N. P.* 43. On a perusal of these cases, it is found that they relate to evidence offered in support of pleas in bar, or peremptory exceptions, or at least defences partaking of the nature of such

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pleas. To support an exception *res judicata* not only the parties must be the same, but the cause of action must also be the same; the identical issues of fact and law, are required to have been decided on in the first suit. In the case now under consideration, the testimony, as contained on the record of the former suit, was not offered in support of the plea in bar. It was tendered as proof of facts known only to witnesses, one of whom was dead, and the other not within the reach of civil process; of facts the proof which had been obtained from them by legal examination, in which both parties to this suit had opportunity to interrogate the witnesses on facts pertinent to the issue in the former suit, and equally pertinent to the issue in the present. It is evidence, so far as received, necessary to the support of both actions.

We are of opinion that the judge did not err in admitting the depositions of the witnesses to establish facts relative to the issue in the present case. See *Phillips' Evidence*, p. 206; and the cases cited by the counsel for the defendant.

Opposition, on the merits of the claim made against the plaintiff's right to re-

on a general average, and in support of this opposition, several grounds are assumed by the appellant's counsel:

1st. That from the manner in which the merchandise was removed from the sloop, no cause of action occurred for a general contribution.

2d. The plaintiff shows no property in the goods.

3d. There is no bill of lading or proof that the captain knew that the boxes were on board.

4th. Admitting a cause of action to exist, the plaintiff has mistaken his remedy, in not suing all persons who had goods on board the vessel. Lastly, that there is error in the calculation made by the district court.

It is true, strictly considered, that there was not a *jactus mercium* of the appellees property. A sacrifice of the goods was not intended, when they were placed on the beach. But they were removed from the vessel to relieve her from the bar on which she was aground, and to enable her to prosecute the intended voyage. The damage which they received was evidently a direct consequence of their removal, for the purpose of lightening the

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sloop; which produced general benefit to vessel and cargo. We can perceive no substantial difference, between a case of injury to property put into boats for the purpose of lightening a ship, and one like the present, where the damage occurred by placing them on shore, or on a beach. The former is regarded in the light of a jettison, and so should the latter. See *Stevens on Average, p.* 15.

As to the property in the goods, although from the evidence the plaintiff does not appear to have been the absolute proprietor at the time he shipped them; it is clear that he was conditional owner, and that the right of his taking on himself the absolute ownership depended on his own volition. It is clear the circumstances compelled him to become complete owner before the restitution of this suit. In truth, we have no doubt of his right to maintain the present action, so far as it depends on ownership.

The evidence of Davidson supplies the want of a bill of lading, for he testifies to the receipt of the goods by the captain, and that they were in good order at the time.

The objection to the form of the action seems to be based on the principle, that a

plaintiff ought to pursue all the individuals liable to contribute on a general average in the same suit. In the present case it is not shown that he has not pursued that course; for the evidence of the cause points out no other except the defendant, who might be compelled to contribute. Many cases might arise, wherein it would be impossible for a plaintiff to pursue all liable to contribution in the same action; one readily perceived, is when they reside in different states of the union. There is, therefore, no objection to the form of this suit, according to the jurisprudence of this state. If there be other persons liable to share the loss, they ought to have been pointed out by the defence. See 2 *Holt on Shipping*, *p.* 199.

By a calculation, based on the whole value of the sloop and freight as proven, less the probable costs of the voyage and seamen's wages, say about 200 dollars, we find an error in the estimate made by the court below of about forty-five dollars.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be reversed and annulled; and it is further

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ordered, adjudged and decreed, that the plaintiff and appellee, do recover from the defendant and appellant 455 dollars, and that the appellee pay the costs of this appeal.

Hennen for the plaintiff, *Peirce* for the defendant.

LIVINGSTON vs. *WALDON.*

APPEAL from the court of the first district.

Purchasers at sheriff's sales are not responsible for irregularities antecedent to the issuing the order of sale.

A sale by the sheriff of New-Orleans, for taxes, is legal, if it pursue the same formalities which are directed for the sale of lands in other parts of the state.

MARTIN, J., delivered the opinion of the court. The sheriff of the parish of Orleans having demanded from the plaintiff, payment of the taxes, wherewith he stood charged, on a list transmitted to that officer, by the treasurer of the state, under the act of 1816, *chap.* 47, §5, 3 *Martin's Digest*, 380, *no.* 49, the plaintiff desired that three lots, of which he furnished a written designation, should be seized and sold. They were purchased by the defendant's vendor, and a recovery of them is the object of the present suit.

The defendant sets up his title, and prays, if it be not legal, he may be allowed the sum paid

by his vendor in discharge of the plaintiff's taxes, and the value of his improvements.

There was judgment against the plaintiff, and he appealed.

His counsel has built his hope of success in procuring the reversal of the judgment, on a number of irregularities alleged to have crept in the appraisement of the property, the assessment of the taxes, and the advertisements of the sale.

As to any irregularity anterior to the transmission of the list by the treasurer to the sheriff, we are of opinion that a purchaser at the sale of the latter, cannot be more affected by them, than the vendee on a *fieri facias*, by any error in the proceeding prior to the judgment, or in the judgment itself. We have therefore made no inquiry into any of the alleged irregularities, except those which are stated to have happened in the advertisements.

The plaintiff's counsel urges, that no advertisement was set up; that the sale was not advertised in the French and English languages during thirty-five days, as the law requires, in case of a sale of real property on a *fieri facias*.

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The defendant's counsel shows, that the sale was advertised during the whole month of October, in French and English, in one newspaper, except on the Sundays; and in another, on the last day of September, and during the whole month of October, except on the Sundays, in the English language only.

It however appears, that in the newspaper publishing in both languages, there was an omission, as to the English language, of one day.

The plaintiff's counsel contends, that the sheriff had no other legitimate rule of conduct, in the advertisements of the sale, but that prescribed to sheriffs, by the act of 1804, in selling real estate on *fieri facias*.

The defendant's counsel urges, that land sold for the payment of taxes, is sold, according to law, after three weeks public notice at least; that this rule, the only one prescribed by law, for the sale of such land, was obligatory on the sheriff of the parish of Orleans; that he has completely followed it, and therefore the defendant's vendor acquired a good title.

This is the only point on which the case turns.

Throughout the state, except the parish of

Orleans, land is sold for the payment of taxes by the collectors, *after giving at least three weeks' public notice.* 1813, *cap.* 53, §12.

In the parish of Orleans, the treasurer of the state is the collector. 1808, *cap.* 24, §10. If, therefore, he should sell, he must do so *after giving at least three weeks'* public notice: any other rule would be arbitrary.

But to facilitate him, the legislature has authorised him to issue an execution to the sheriff; whether, on such an occasion the sheriff is to proceed as on an execution out of courts, by appraisement, and advertising during thirty-five days; whether he cannot sell, if the land do not bring a certain proportion of the appraised value, we have not inquired; for in the case under consideration no execution issued; but the land was sold under an act of assembly, 1816, *cap.* 47, §49, which provides that the treasurer may transmit to the sheriff of the parish of Orleans, any list or lists for the collection of taxes, and it shall be the duty of the sheriff *to prosecute* on the same, for the collection of said taxes, *without* requiring any execution.

To prosecute on the same. How? surely not by the institution of a suit, in the ordinary

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way. The poor would then be subject to more costs than the amount of their taxes. We understand this expression as synonymous with, *to proceed on the same.* How? In the manner pointed out by law to those who in other parishes have the like duty to perform; *i. e.* by a demand, and if necessary, a sale, *after giving at least three weeks' public notice.*

A sale, in the mode pointed out on a *fieri facias* would be too tedious and dilatory: the property must be appraised; if it do not bring the fixed part of the appraised value, the property must be advertised, and sold on a credit. It cannot be presumed that the rule, prescribed on the sale of land for taxes throughout the state, should not be that the legislature intended to have followed in the parish of Orleans, because a particular officer was to sell. There is by far a greater analogy between the sale of land for taxes, on one side of the Mississippi by the sheriff, and a like sale by a collector on the opposite side, than between such a sale in the parish of Orleans for taxes, and one on a *fieri facias.*

We think the sheriff did not err, when being directed to sell the plaintiff's land for the payment of his taxes, he sold them in the

mode prescribed by law for like sales throughout the other parishes.

And it appears to us, the sheriff, in the present case, did comply with the formalities the law requires.

He was to sell, after giving public notice for three weeks at least. It is said he set up no advertisement. The defendant offered to prove in this court that he did; the plaintiff objected to the introduction of any evidence out of the record, and we sustained the objection. The law has fixed no particular manner of giving notice. The record shows notice was given for upwards of four weeks, in two newspapers printed in the parish. We think this is a more effectual way of giving notice of the sale, than by setting up a few advertisements: several thousand copies of the advertisement were struck off, and dispersed through the parish: certainly this is as effectual a way of giving notice as can be devised.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Smith for the plaintiff, *Hoffman* for the defendant.

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TURCAS & AL.
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TURCAS & AL vs. *LEGLISE.*

APPEAL from the court of the parish and city of New-Orleans.

To the formation of a *concurso* three creditors are necessary, but it is not necessary they should be present at the meeting.

The insolvent may be appointed syndic.

PORTER, J., delivered the opinion of the court. This case comes up without statement of facts, bills of exceptions, &c. but errors are assigned, as being apparent on the face of the record. They are:

1st. That only two creditors met and voted for the appellee as syndic, when the meeting should have been composed of at least three to render the proceedings valid.

2d. That the insolvent was improperly appointed syndic, as that trust can only be confided to a creditor of the estate.

3d. That a man cannot be his own creditor.

We have no difficulty in giving our assent to the last position, but we cannot accede to the first and second.

I. The authority relied on by the appellants counsel, does not support the position assumed. The author does not state that three persons are required to form a meeting of creditors. He says the insolvent must

be indebted to three persons at least, and must name them in his bilan in order to form a *concurso*; which is very different from declaring the proceedings void, unless more than two out of a greater number attend, and vote for syndics. In the present case, the appellants are placed in a dilemma, fatal to this objection. If they are not creditors, they have no right to appeal. If they are, the insolvent had more than the number required by law. *Feb. lib.* 3, *cap.* 3, §1, *no.* 16.

II. We are also of opinion, the second objection has not been sustained. There was nothing in the law previous to the passage of that article in the code on which the appellant relies, that prohibited creditors from appointing as syndic the insolvent himself; and that article in declaring that they may appoint as syndic one among themselves, cannot be considered as repealing former provisions from which it differs, but to which it is not contrary. The enactment that creditors may appoint particular persons, can well stand with the ancient laws that they might appoint them and others. This construction is strengthened by the consideration that since the passage of the general provision in our for-

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mer code, the legislature in acting specially on the subject of insolvency, have affixed no limits to the choice, and in the late revision of that work, they have stricken out the words on which the appellant relies. *Salgado Lab. Credit. Concurs. part.* 1, *cap.* 13; *Feb. lib.* 3, *cap.* 3, §1, *no.* 26; *Civil Code*, 84 *art.* 34; *Acts of* 1817, 130 *and* 132, *sec.* 10 *and* 14; *Louisiana Code*, *art.* 417.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Seghers for the plaintiffs, *Ripley* for the defendant.

WILLIAMS & AL. vs. *HORTON, CURATOR.*

APPEAL from the court of the third district.

A donation of slaves without estimation is void.

MATHEWS, J., delivered the opinion of the court. This suit is commenced against the curator of the estate of the absentees, in which the plaintiffs allege themselves to be forced heirs of Rebecca Horton, together with Mary Ann Spencer, who is made defendant in the

action, through the medium of the curator of her estate, appointed in consequence of her absence from the state. The object of the suit on the part of the petitioners, is to have two deeds, by which Rebecca Horton in her life time conveyed certain property to said Mary Ann, set aside and annulled on the ground of fraud and prejudice to the plaintiffs, as forced heirs of the grantor. One of these instruments purports to be an act of sale, the other a deed of gift. The cause was submitted to the decision of a jury in the court below, who found a verdict, declaring the act of sale to be fraudulent, and that of donation to be void, on account of legal informality in its execution. On this verdict a judgment was rendered, decreeing both acts to be void, and deciding that the property intended to be conveyed by them, belonged to the succession of the vendor and donor; from which this appeal was taken on the part of the defendant.

A new trial was moved for in the district court on several grounds. 1st. Because the verdict is manifestly contrary to the law and evidence of the case. 2d. That it is insufficient and informal, as not having decided on all the

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matters at issue between the parties, particularly in not finding that the property should be collated and partitioned. 3d. Because the jury erred in rescinding the donation.

The appellants according to the points filed in this court, seem to rely principally on the same grounds, for a reversal of the judgment of the inferior court, which were there assumed in support of their motion for a new trial. In relation to the allegation of simulation and fraud in the act of sales; being a subject most properly cognizable by a jury, unless their verdict be clearly contrary to the weight of evidence in the cause; it would not be correct for this court, or the judge of the court below, to set it aside. The whole evidence of the case, which appears by the record to have been heard by the jury, in our opinion, establishes facts from which they may have fairly inferred simulation in the deed of sale, and consequently fraud on the rights of the appellees as forced heirs of the seller. The objection made to the verdict on account of not having decreed a collation and partition of the succession of R. Horton, is wholly without foundation; for the sole, or at least principal object of the present suit, is to destroy the

effect of the acts of sale and donation made by the mother of the parties: and if they be null and void, collation will have nothing to do in the case, because the property which was intended to be conveyed by them must be considered as constituting an unappropriated part of her estate.

The reasons why our legislature, in conformity with the legislation of France, should have embarrassed donations with so many forms, are not very palpable and evident to the minds of men who are only conversant with ordinary affairs of human life; in truth, they cannot be considered as very conspicuous and imposing on those learned in the law. Why honest generosity should be thus trammeled, is not easy to account for; *sed ita lex.* In resorting to *Toullier's Commentary on the Code Napoleon*, it is discovered that tradition, *i. e.* delivery *de manu in manum* of movables, according to the decisions of the courts of justice in France, dispenses with many, if not all the forms prescribed by the Code for the perfection of donations. See 5 *Toullier, p.* 181 *to p.* 184. Want of estimation of the property given, is cured by delivery of moveables. The forty eighth article of our late Civil

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Code is *verbatim* that of the 948th article of the *French Code;* except that ours provides expressly in the same manner for the donation of slaves, and requires that an estimate should be made of them and signed by both donor and donee, &c. There can be no doubt, according to the interpretation given to this law by French jurists, and which we believe to be correct, of tradition of movables obviating the invalidity of a donation, which would otherwise take place for want of an estimate. The only question which remains for examination is, whether the delivery of slaves, under a deed of grant, made and accepted in due form, will, agreeably to the general rules of property in this state, produce the same effect?

The principal reason which seems to have influenced the opinions and decisions of those who have considered tradition of moveable property made in pursuance of a will to give, as sufficient to cure all defects of form in donations, is that possession of this kind of property is held to be equivalent to title, or in other words, to be evidence of title. But according to our laws in relation to titles by which property is held, a written instrument

is required in order to transfer slaves from one proprietor to another; and when the evidence offered in support of title to them is an act of donation, to give it validity, it must appear clothed with all the formalities required by law, and sanctioned by an authentic deed. Mere possession is not evidence of title. In the present case, the notarial act is invalid for want of the estimate required by the code, and is therefore no evidence of title in the donee, because donations cannot be supported by any instrument inferior to authentic acts. In this species of contract, forms appear to assume the place of substance. From the foregoing review of the case, there can be no difficulty in perceiving the difference in the legal principles which govern it from those on which the decisions were made, relative to synallagmatic contracts, relied on by the counsel for the appellants.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts & Lobdell for the plaintiffs, *Preston* for the defendant.

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ZOIT.
vs.
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ZOIT vs. *MILLAUDON.*

APPEAL from the parish court of the parish and city of New-Orleans.

Exceptions to the report of referees may be made *ore tenus*, if no objection is taken to that mode.

The consignee, who was agent in the purchase, may sell the goods to replace his advances.

MATHEWS, J., delivered the opinion of the court. In this case, the plaintiff claims from the defendant 836 dollars 53 cents, a balance which he alleges to be due to him on account of cotton which was shipped to England and sold on his account, through the agency of said defendant.

The accounts of the parties were by their consent submitted to referees, who reported in favor of the defendant 206 dollars 20 cents, which sum was claimed by him in his answer. This report was not adopted by the court below as the basis of the judgment, on account of being considered as erroneous in point of law, and judgment was there finally rendered in favor of the plaintiff for the full amount of his claim; from which the defendant appealed.

The statement and evidence of the case show, that the defendant, at the request of Debuys & Longer, who appear to have been agents for the plaintiff *quoad hoc*, shipped sixty-

six bales of cotton to England, on which he advanced eight cents per pound. The cotton was at the risk of the defendant, and the proceeds of sales were, by special agreement, to be vested in crockery ware, to be sent to and received by the defendant, to be delivered over to the plaintiff, on his refunding the advances made on the cotton, and paying commissions and interest, &c. This agreement seems to have been carried into effect up to the purchase, shipment, and receiving of the crockery ware by the defendant. After it had remained some time on hand, he addressed a note to Debuys & Longer, who had acted as agents for the plaintiff in the affair of the advances and shipment of the cotton, and of the investment of the proceeds arising from sales in England, requiring to have refunded to him the money advanced, and also his commission and interest on the whole transaction, and that the crockery ware should be taken away. To this note they reply, that their agency for the appellee had ceased, leaving the appellant to choose his own mode of obtaining remuneration for the advances, commission, &c. In order to indemnify himself, it appears that ten or twelve days after this

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correspondence, he caused the crockery ware to be sold at auction, which sale took place about the 13th of September, 1823: this merchandise had then been on hand, according to the dates of the account current, from the last of May preceding. It sold at a loss on the original cost, which, his counsel contends, ought to be borne by the appellee.

The accounts between the parties in relation to matters of fact, it is agreed, have been properly stated and reported by the referees; leaving for the decision of the court, a question as to the legality of the appellant's proceedings in the sale of the crockery ware on account and at the risk of the appellee: before, however, entering on the discussion of this question, the only one of much importance in the cause, it may not be improper to examine one raised on the report of the referees, in the solution of which, we are of opinion, the court below was correct. It is contended, that as no opposition was filed in writing, to the award or report of referees, the parish judge could not, on sound legal principles, refuse to make it the judgment of the court. In the present case, the submission of the accounts to the persons appointed by the court, although

done with the consent of the parties, did not change the nature of their office, so as to give them full cognizance of the cause, like arbitrators or judges chosen by parties to a suit. The law does not positively require that opposition should be made in writing to the report of referees: if made, *ore tenus*, and contested by the counsel of the parties, it should suffice. The act of a court referring accounts to fit persons, for examination and adjustment, certainly does not transfer to such referees a right to determine finally, questions of law which may arise in relation to such acts.

In coming to a conclusion on the main question of the case, the court is much relieved from the perplexity and labor of research which it might otherwise require, by a decision heretofore made, to be found in 8 *Martin*, *p.* 402 *et seq.*

That was a case in which the vendor of property resold it for account and risk of a vendee, who neglected to receive and take it from the warehouse of the former. The present is one in which a consignee, who was largely in advance to the owner of goods, procured through the agency of the former, and which were not to be delivered to the

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latter until payment should be made by him of said advances, which formed indirectly a a large portion of the price of the articles thus purchased and procured, caused said goods to be sold at the risk of the proprietor, for the purpose of effecting a fulfilment of the contract existing between the parties. This step was not taken until after due notice was given to the persons who had acted for the owner in making the contract, nor until a reasonable time had elapsed, in which the agreement should have been finally adjusted. In truth, any distinction which may be made between the two cases, forms no difference in their legal character. See the authorities referred to in the case cited. *Ex necessitati rei* the holder of the property becomes agent for the owner in the sale made.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be avoided, reversed, and annulled; and it is further ordered, adjudged, and decreed, that judgment be here entered for the appellant and defendant for $206 20, with costs in both courts.

Seghers for the plaintiff, *Derbigny* for the defendant.

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HILL
vs.
MORGAN.

HILL vs. *MORGAN*.

APPEAL from the court of the first district.

MARTIN, J., delivered the opinion of the court. The defendant is sued as a tresspasser, having seized a quantity of coffee, which the plaintiff alleges to be his, on a writ of sequestration directed to him to seize coffee sold by Gale to Dewit. There was a verdict and judgment against him, and he appealed.

It is not necessary to the completion of the contract between vendor and vendee, that the article sold should be weighed in presence of the latter.

Payment is not a suspensive condition of a cash sale.

The right of the vendor to claim back the thing sold within eight days, can only be exercised when it is in possession of the vendee.

It appears Gale sold the coffee to Dewit on the 7th April. to be paid on delivery: the delivery was completed at half past twelve on the 8th, when Dewit, being in want of money to take up an acceptance by three o'clock, sold the coffee to the plaintiff, one hour after the delivery, and one hour after it was brought to the warehouse in which the plaintiff wished to have it stored. The plaintiff stipulated that the costs of drayage and storage during one month should be paid by Dewit. After the coffee was brought to the warehouse, and partly taken in and partly left before the door of it, and the owner of the warehouse had receipted for it, the plaintiff paid 4500 dollars

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to Dewit, and then the sheriff seized the coffee on a writ of sequestration, on a suit by Gale against Dewit.

The defendant's counsel urges, that the coffee was still the property of Gale, because sold for prompt payment and unpaid for, and because it was sold by the pound and had been weighed by Gale, without the presence of Dewit, who never did agree to the weight.

That, if it be not the property of Gale, it is of Dewit, because, the coffee was not weighed on the second sale; because, as Dewit was to pay the drayage and storage for one month; the coffee was still in his possession, and there had been no delivery to the plaintiff; consequently no tranfer of property.

It is further contended, that as the sale to Dewit, was not on a credit, the vendor had a right, within eight days, to seize the coffee, notwithstanding a sale to a part purchaser.

That the thing sold is, after the agreement as to the object and price, at the risk of the vendee, is a matter of the *nature*, and not of the essence of the contract, and it is not less perfect, because this circumstance be excluded by a *stipulation* or by a *provision* of the law.

The sale, of a thing to be weighed, is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed. *Civil Code*, 2433. This is the only difference this circumstance creates; in all other respects the sale is complete and perfect.

But, in the present case, the coffee had been weighed. The circumstance of its having been so, out of the presence of Dewit, might authorise him to refuse payment till the coffee was weighed before him, or till the fairness of the weight was established by legal proof, which he was unable to contradict; and as he received the coffee and sold and delivered it into the warehouse, indicated by his vendee, it is clear he discharged his vendor from the risk; and so the sale was at all events, and in all respects between him and his vendor, as perfect as if it had been weighed in his, Dewit's presence; though he was not, perhaps, concluded by the weight, and had the faculty of showing any error in it.

As to the second sale, it is in evidence that a note of the weight, from Gale's books, being furnished to the plaintiff, he was informed payment might be made thereon, if he was not satisfied, he might weigh the coffee; a cir-

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cumstance which did not prevent him from receiving it, and making a very considerable payment thereon.

We think that notwithstanding Dewit was to pay for drayage and storage for a month, still after the coffee was brought to the warehouse, and the keeper had receipted for it, although some bags were still on the pavement, the coffee was delivered, and was at the risk, and consequently the property of the plaintiff.

Surely the promise to pay for one month's storage in a warehouse, designated by the vendee, would not leave the thing sold at the vendor's risk, without a positive stipulation. It is clear that if the warehouse had taken fire and the coffee been destroyed, the loss would have been the plaintiff's, not Dewit's; as the coffee was at his risk it was his *res perit domino*.

We therefore conclude that the sales were both complete and perfect.

But it is urged that payment is a suspensive condition of a sale when no credit is given, and that till it be effected, the property does not pass to the vendee.

To this we have a contrary express statutory provision. Between the parties the

sale is considered as perfect, as soon as there exists an agreement for the object and the price, although the object has not been delivered, *nor the payment made. Civil Code*, 2431.

This however is said to be a general provision to which a sale for prompt payment proves an exception. It is clear the statute does not distinguish, and we cannot see how we can.

The particular provisions made for the security of the vendor in such sales, sufficiently show he is included in the general.

Until paid, he may refuse to deliver. *Civil Code*, 2463.

While the thing remains in the vendee's possession, he may within eight days avoid the contract, claim the thing, and prevent its sale. *Civil Code*, 3196.

After eight days, the thing being still in the possession of the vendee, the vendor may demand the sale and his payment out of the proceeds, in preference to all other creditors. *Civil Code*, 3194.

We cannot agree to the construction urged on us by the defendant's counsel of the art. 3196. It gives the vendor the right "to

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claim back the things sold, *as long as they are in the possession of the purchaser*, and prevent the resale of them; provided the claim for restitution be made within eight days."

This does not give any right against a fair purchaser to whom the thing has been delivered. The resale may be prevented, but not set aside; to prevent a resale is the consequence of the claim for restitution, when the vendor prefers that to the payment of the price, and the statute gives this claim for restitution, as long as the thing is in the possession of the purchaser; not after.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Livermore for the plaintiff, *Hennen* for the defendant.

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EGGLESTON
vs.
COLFAX & AL.

EGGLESTON vs. *COLFAX & AL.*

APPEAL from the court of the third district.

An attorney, in fact, may bring suit in his own name, for the use of his principal.

The amount expressed in the bond of a curator is *prima facie* that which is due the heirs.

PORTER, J., delivered the opinion of the court. This action is instituted, on a bond given by the defendant Colfax for the faithful discharge of his duties as curator of a vacant estate. The surety is also joined in the action. There was judgment against them, and they appealed.

The first objection to the correctness of the proceedings which we are required to notice, is contained in the answer filed by the defendants. There is a plea in it that the plaintiff cannot maintain an action in his capacity as *agent*. That the suit should have been brought in the name of those he represented.

We do not think it well founded. Under the power of attorney, filed with the petition, the plaintiff was appointed for the special purpose of recovering the shares of his principal of the succession of whom the defendant was curator. According to the former laws of this country, and in this respect no change has been made in them, the attorney could bring

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suit in the name of those he represented, or in his own name for their use and benefit. It cannot be doubted that the judgment in this case, and between these parties, would enable the defendant to present the plea of *res judicata*, if sued again on the same matters by those from whom the plaintiff holds his powers. A judgment in their own name would have no other, or greater effect.

The next objection is, that there is no evidence on the record which shows the amount due. The bond itself shows this. The law requires, it should be taken for the amount of the estate as appraised in the inventory; the sum, therefore, expressed in the obligation is *prima facie* that which is due to the heirs, who are absent, unless the curator shows, what disposition he has made of the estate in his hands. *Civil Code*, 176 *art.* 134.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Watts & *Lobdell* for the plaintiff, *Woodruff* for the defendants.

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M'RAE
vs.
BUSHNELL.

M'RAE vs. *BUSHNELL.*

APPEAL from the parish court of the parish of East Feliciana.

The constitution does not authorise the court to take cognizance of any case where the object in dispute is below $300. Whether the legislature can confer the power?—*quere.*

MARTIN, J., delivered the opinion of the court. The plaintiff alleges that the defendant has caused a *fieri facias* (obtained at his suit, against her former husband) to be levied on 6,800 pounds of seed cotton, the property of her son; that her said husband died insolvent, after having taken the benefit of the act, obtained an injunction, which the defendant in action had dissolved; she appealed, and her petition alleges that the defendant is judge of the district, that includes the parish in which the judgment was rendered, and that the value of the cotton seized is sufficient to authorise an appeal from the parish court, wherefore she prays the appeal to this court.

By the *Code of Practice*, the judgments of parish courts are appealable from, when the amount demanded exceeds $100, *art.* 568; and the legislature has said the appeal must be brought to this court, when the district judge cannot sit on it. *Ibid.*

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M'RAE vs. BUSHNELL.

The jurisdiction of parish courts extends to such cases only, in which the value in dispute does not exceed $300.

Our jurisdiction, by the constitution, extends to civil cases, in which the object in dispute exceeds $300.

It is very clear that the constitution does not authorise us to sustain an appeal, when the value of the object in dispute is below $300: can the legislature authorise us to do it? Is it not necessary we should inquire into this; for, admitting that it can, it does not authorise an appeal from the parish court, unless the object in dispute be worth $100; nothing shows the value of the seed cotton seized. The petition alleges that it is sufficient to authorise an appeal; but this is not sworn to, and is stated argumentatively; we are only informed that, in the opinion of the appellant, it is of sufficient value; but that value should have been stated, before we could admit the conclusion.

It is therefore ordered, adjudged, and decreed that the appeal be dismissed with costs.

Woodruff for the plaintiff, *Watts & Lobdell* for the defendant.

HARRIS' TUTOR vs. *M'KEE & AL.*

APPEAL from the court of probates of the parish of St. Helena.

The court of probates has not jurisdiction of a case where the heirs of a succession claim property from those who hold under a title adverse to them and their ancestor.

PORTER, J., delivered the opinion of the court. The petitioner claims for his minor children a partition of certain slaves in the possession of the defendants.

The right, to do so, is derived from a donation made so far back as the year 1800, to Daniel, Elizabeth, Ann, and Mary Bookter, two of whom have since died without issue. The plaintiffs are the descendants of Elizabeth, who is also deceased.

There was a plea to the jurisdiction in the court below: we think it should have been sustained.

We see nothing in the allegations of the parties, nor in the evidence adduced, which could enable the court of probates to take cognizance of the case. That court is the proper one to make a partition of a succession, where the parties claim as heirs or legatees; and no defence is made under another title, or in a different capacity. In the present case, if the minor heirs had wished to

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HARRIS'TUTOR vs. M'KEE & AL.

make a division of effects which they held in common, they would have been before the proper tribunal; but the object is to recover from a party who claims adversely to them and to their ancestor, and the ordinary courts can alone settle that question. The case on the part of the plaintiff is not made stronger, by supposing Bookter's succession to be interested in it; for, the defendant set up a title which is equally opposed to a demand in that right. The 924th article of the Code of Practice, on which the inferior court sustained the case, relates to persons of full age who have a right in a succession. *Ante*, 77.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of nonsuit, and that he pay costs in both courts.

Bradford and *Watts & Lobdell* for the plaintiff, *Preston* for the defendants.

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CLAMAGERAN
vs.
BUCKS & HEDRICK, AND AL.

CLAMAGERAN vs. *BUCKS & HEDRICK, AND AL.*

APPEAL from the parish court of the parish and city of New-Orleans.

A third party cannot intervene in a suit to plead peremptory exceptions on behalf of the defendant.

PORTER, J., delivered the opinion of the court. This action was commenced by attachment. An attorney was appointed for the absent debtor; an answer was filed by him, and the cause put at issue.

At this stage of the proceedings Mellon intervened. In his petition he states, that the defendants in this suit were indebted to him, and that he had attached the same property which was levied on in this case. That by reason of these premises he had a right to intervene, and show that the affidavit on which the attachment had issued was not made according to law; that consequently all the proceedings were null and void.

The court below refused to set aside the attachment, and gave judgment for the plaintiff. The intervening party appealed.

We are of opinion the court below did not err. The affidavit contains every substantial

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CLAMAGERAN *vs.* BUCKS & HEDRICK, AND AL.

averment which the act of the legislature requires; and it is sufficiently positive, for perjury, could be assigned on it, if the affiant swore falsely. We are also of opinion, that an intervening creditor cannot plead peremptory exceptions, the only object of which, is to have the cause dismissed for irregularities in the proceedings. These were matters for the consideration of the defendants, or those who represented them, and if they thought fit to wave a defence which should not be used in a just action, no other party can. It is exercising rights which do not belong to him, and which no law that we are acquainted with confers.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Cuvillier for the plaintiff, *Watts & Lobdell* for the intervening creditors.

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MALCHAUX
vs.
LEFEBVRE.

MALCHAUX vs. *LEFEBVRE.*

APPEAL from the court of the parish and city of New-Orleans.

Where payment to a third party is the condition of a contract, the receipt from him is evidence between the parties contracting.

MARTIN, J., delivered the opinion of the court. The plaintiff seeks to recover a sum of money which she trusted to the defendant's son, on his, the defendant's promise, to guaranty the repayment, and his assurance that he had goods of his son in his possession sufficient to produce the sum.

The defendant admits he informed the plaintiff before the loan, he had goods of his son, but warned her that, in his opinion, they were not of sufficient value to secure it: that he was not requested to hold on the goods; that he did not guaranty the payment, and, without opposition from the plaintiff, he accounted with, and paid the balance in his hands to his son.

There was a verdict and judgment against the plaintiff: he appealed.

A bill of exceptions was taken, at the trial, to the opinion of the parish judge, who ad-

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MALCHAUX vs. LEFEBVRE.

mitted in evidence the accounts current of the defendant with his son; the plaintiff objecting thereto, as a paper, in the confection of which she did not concur.

The defendant had alleged, and was bound to prove that he had accounted for and paid the amount of certain goods in his hands to his son: of this he possessed a *literal* proof, which excluded parol evidence.

We think the court did not err in suffering these papers to go to the jury.

On the merits, the case turns on a mere question of fact; the extent of the defendant's engagements: and, we do not see any reason to interfere with the decision of the jury.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Mazureau, and De Armas, for the plaintiff, *Moreau, and Morphy*, for the defendant.

CONWAY & AL. vs. CHINN.

APPEAL from the court of the second district.

A judge cannot certify after judgment, that the record contains all the matters on which the case was decided, unless it appears it was tried on written documents.

PORTER, J., delivered the opinion of the court. That part of the application for a re-hearing, and that only, which relates to a supposed error of the court, in considering there was no statement of facts, requires to be particularly noticed.

In the opinion delivered with the judgment of this court, we stated there was no statement of facts. The certificate of the judge being made out months after the trial and decree, was regarded by us as a nullity.

The law allowed the judge to certify at any time, if the cause was tried on written documents. It prohibited him from doing so, if parol evidence was heard. This record does not show the case was decided on written documents alone: no evidence appears on it. Whether any was given or not, we can only learn from a certificate, which cannot give us judicially, the knowledge of what transpired at the trial, unless the case was tried on written documents. There is perhaps not so much danger that the judge should forget

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CONWAY & AL. *vs.* CHINN.

the whole of the parol evidence as a part of it; but the law has made no exception, and we can make none. 10 *Martin*, 645; 3 *ibid.*, 204; 5 *ibid.*, 666. Whether the Code of Practice has made any change in the law need not be inquired into, as the case was decided months before it was in force.

The re-hearing is therefore refused.

Watts and Lobdell for the defendant.

MYLES vs. *MILLER.*

APPEAL from the court of the eighth district.

Pleas of payment and want of consideration are not inconsistent.

PORTER, J., delivered the opinion of the court. This action was commenced on a promissory note. The defendant pleaded compensation, payment, and that the note sued on was given for part of the purchase money of a house and lot, which Ford, to whom the plaintiff is curator, stated he had a title, but that in fact he had none.

A bill of exceptions was taken at the trial, to the opinion of the court, permitting the defendant to submit facts in conformity with the

answer, to the jury. The ground for this exception is, that the pleas of payment, and want of consideration, are inconsistent.

The pleas of payment, and want of consideration, are not so inconsistent but they may well stand together, for the one, does not necessarily suppose the other, to be false. A man may pay a note, and not discover, until after the payment is made, that the consideration on which he gave it was wanting.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Hennen for the plaintiff.

NABA vs. *SOUBERCASE'S HEIR.*

APPEAL from the court of probates of the parish and city of New-Orleans.

The judgment of the inferior court will not be reversed when the evidence leave the fact doubtful.

PORTER, J., delivered the opinion of the court. The plaintiff claims from the estate of Soubercase the sum of $1500 on the following obligation:

"*J'ai reçu de Mr. Jean Naba quinze cents pias-*

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tres pour un intérêt de pareille somme, qu'il a pris sur mon chargement par le brick Tippo Saib, Capt. P. Fosse, tant pour les bénéfices ou pertes qui pourront en resulter, et dont je lui rendrais compte à la fin du voyage. Nouvelle-Orléans, le 30 *Juillet*, 1817.

Fleuri Soubercase."

The defendant pleads the general issue, and further that the claim set up in the petition has been long since settled.

The question presented for our decision is one of fact alone, and it might be sufficient to say, as we have so frequently said in other cases, that we would not reverse the judgment of the inferior court when the evidence left the fact doubtful; more particularly where the decision was against the party holding the affirmative.

But after a careful examination of the testimony, we think the propriety of the judgment rendered below, can be placed on stronger grounds. The deceased undertook, to render the plaintiff an account of the transaction in which they were mutually concerned, at the end of the voyage. No such account appears to have been rendered; no payments are proved to have been made. The possession of the obligation on the contrary, raises a

presumption that it was not discharged; the only thing, therefore, which has the appearance of defence is, the fact of the amount of sales of this adventure having been carried to the credit of the plaintiff on the books of Paul Lanusse. But then, the knowledge of this is not brought home to the former, nor his assent to it shown. There is some presumption of it raised, by his being intimate with Lanusse, and by the length of time that he suffered to elapse before he brought suit. But these are not sufficient to enable the court to refuse to give effect to the legal obligations which the defendant came under by the contract proved in evidence. If men will transact business in such a way as to leave their heirs and representatives entirely dependant on the good faith of those with whom they contract, they cannot expect that conjectures and presumptions will stand in the place of legal proof.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

Seghers for the plaintiff, *Morel* for the defendant.

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May, 1826.

BAUDIN
vs.
DUBOURG &
BARON.

BAUDIN vs. *DUBOURG* & *BARON.*

APPEAL from the court of the first district.

When the defendant is sued as *attorney in fact*, and the judgment is general, the judgment does not affect the defendant in his own right.

A mistake in the report of referees cannot be assigned as error.

MARTIN, J., delivered the opinion of the court. This case is before us on an assignment of error, by the defendants and appellants.

1. The judgment is against the defendants, while on the transaction complained of, they were not principals, but only attorneys in fact or agents.

2. That the sum of $700, admitted by the plaintiff to have been received, was not allowed in compensation.

We are of opinion the appellants cannot be relieved on either of these points. They are sued as attorneys in fact, and nothing on the record shows that the plaintiff meant to recover from them in any other capacity. The judgment therefore must be taken *secundum allegata*, and the relief obtained confined to the capacity the petition gives them; as if sued as executors, curators, &c.

The case was submitted to referees; if they

erred, their report ought to have been objected to: and while they were silent, the court could not *ex officio* take notice of the error. The errors which may be assigned as apparent are only those into which the court itself falls, not those of referees, which are always cured by the submission of the party without objection.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs.

Moreau for the plaintiff, *Cuvillier* for the defendant.

HICKS vs. *DUNCAN & SONS.—STRAWBRIDGE, APLT.*

APPEAL from the court of the first district.

Where the plaintiff in attachment is cast in the suit, the attorney for defendant is only entitled to have the fee of $11 taxed in the costs.

PORTER, J., delivered the opinion of the court. This case commenced by attachment, and the appellant was appointed to represent the absent debtors. The plaintiff failed in his action, and the appellant, as attorney for the defendants, moved the court below, that he

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should be allowed $301 for his professional services, to be taxed in the costs, and paid by the plaintiff.

This application the judge below refused, and in our opinion most correctly. In this court it has been sustained, on arguments drawn from the uniform custom which has prevailed, of taxing in cases of this kind, the fees of defendant's counsel in the plaintiff's costs, and from considerations of the service rendered to the plaintiff, by the appellant's appearing in the cause.

The custom relied on cannot prevail against the law, which limits the tax fee to eleven dollars. The service rendered the plaintiff, by appearing and defeating him in the suit, is not perceived by the court; and even if it were a service, the act of assembly has fixed the compensation for it. The case in 3 *Martin*, contemplates that the payment shall be made out of the property seized; and, as in that case the plaintiff succeeded, there was no positive law standing in the way of the court, allowing the attorney for defendant a compensation equivalent to his services.

It is therefore ordered, adjudged, and de-

creed, that the judgment of the district court be affirmed with costs.

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HICKS *vs.* DUNCAN & SONS

Strawbridge for the plaintiff, *Livermore* for the defendants.

BUSHNELL vs. *BROWN'S HEIRS.*

APPEAL from the court of the third district.

Acts of limitation do not apply to matters which are presented as exceptions.

An injunction which has been granted unadvisedly, will not be dissolved if it appear from the evidence that it must be issued again.

MARTIN, J., delivered the opinion of the court. The plaintiff having obtained an injunction to an order of seizure and sale on the ground that the land sold him was deficient in quantity, and that he was disturbed in his possession of the premises by suit, and further that the sheriff levied without any previous notice to, or demand from him; the injunction was dissolved, the court being of opinion he had not supported his allegations.

The case is before us on two bills of exceptions.

The one was taken to the opinion of the court, in refusing the plaintiff an order of survey claimed, to establish the deficiency to the legal extent.

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The other to the introduction of a record showing a suit brought after the injunction was obtained.

The order of survey was refused because the plaintiff suffered one year to elapse without complaining of this deficiency.

We think the district judge erred. It is true the plaintiff could not have been heard on a suit against his vendors; but it does not follow that he could not use as a shield what he no longer could use as a weapon. *Qua temporalia sunt ad agendam, perpetua sunt ad excipiendum.*

Proceedings on injunctions are not carried on in the formal manner in which ordinary ones are conducted, but *summarily* the strict rules of pleadings are disregarded by the court. *Semper ad eventum furtivat.* It will take care that neither party be surprised or entrapped, but it disregards many obstacles to the attainment of justice. It will receive, as a ground of sustaining an injunction, that which would be sufficient to demand its instant restoration. It will not demolish to rebuild.

In the present case the plaintiff *being sued* had a right to resist the claim of his vendors;

if he did so before suit, he was in the wrong, and ought to be mulcted into costs; but it would be vain to dissolve the injunction, for it must be enforced. *Exnecias* vs. *Weiss*, *vol.* 3, 490.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; the injunction reinstated, and the judge directed to grant the order of survey, and admit as evidence the record of the suit against the plaintiff, the defendant and appellee paying costs in this court.

Watts & Lobdell for the plaintiff.